Windward Teachers Association, NYSUT, AFT, AFL–CIO *and* Windward School. Case 2–CB–19578

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBER LIEBMAN AND SCHAUMBER

The sole issue in this case is whether the Respondent unlawfully failed and refused to sign a successor collective-bargaining agreement submitted to it by the Charging Party Windward School (School).[1] The judge dismissed the allegation, finding that there was no meeting of the minds between the parties on the terms of a clause in the bargaining agreement concerning the payment of bonuses; that the contract was not, therefore, a complete agreement between the parties regarding terms and conditions of employment; and the Respondent did not, therefore, violate Section 8(b)(3) of the Act by refusing to execute the contract.

The School and the General Counsel have filed exceptions to the judge's finding, contending that the parties agreed on the terms of the bonus clause as these terms were set forth in the bargaining agreement and that there was, accordingly, a complete agreement between the parties regarding terms and conditions of employment. For the reasons set forth below, we find merit to the exceptions.[2] Accordingly, we reverse the judge's decision and find that the Respondent's refusal to sign the agreement violated Section 8(b)(3).

Facts

Windward School is a private independent school in White Plains, New York. The Respondent is the collective-bargaining representative of the School's teachers, librarians, and maintenance and custodial employees. Since 1988, the Respondent and the School have been parties to a series of collective-bargaining agreements, the most recent of which was effective from July 1, 1998 to June 30, 2003.[3]

Throughout the bargaining relationship, the School maintained a noncontractual practice of granting bonuses to teachers who volunteered for such extra duties as grade coordinators, chaperones on field trips, student theatrical production directors, and homework club monitors. Also, on one occasion, during Dr. James Van Amburg's first year as head of school,[4] the School granted a $2000 bonus to every teacher who returned the next school year. The School never sought the Respondent's approval to grant any of these bonuses, nor did the Respondent ever contest the School's authority to give the bonuses.

On May 20, the parties commenced negotiations for a successor collective-bargaining agreement. Dennis Derrick, a labor relations specialist for the New York State United Teachers Association (NYSUT), led the Respondent's negotiation team.[5] The other seven members of the Respondent's team—including the Respondent's president, Larry Crosby, and vice president, Kaarina Bauerle—were bargaining unit teachers. Mark Brossman, the School's labor counsel, headed the School's negotiating committee, assisted by Assistant Head of School David Kahn, and the School's board of trustees members Leigh Garry and Bill Jacoby.

The parties held eight negotiation sessions. At the start of bargaining, they agreed that, in addition to economics, the major issues should be annual individual employment contracts for the teachers, union-security clause, and updating the language of the contract to be more consistent with the School's practices.

By the sixth bargaining session, on June 24, the negotiations were deadlocked over some of the major issues. After caucusing, the School's lead negotiator, Brossman, announced, "Well, I think there's something that we can all agree upon." Kahn then stated that the School wanted its authority to grant bonuses without union approval codified in the contract. In the ensuing discussion, members of the Respondent's negotiating team asked if the proposal would cover bonuses similar to the $2000 awarded to each teacher at the end of Dr. Van Amburg's first year as head of school. Crosby stated that he had no

[1] On May 13, 2005, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the School filed exceptions and supporting briefs. The Respondent filed an answering brief and the School filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and order only to the extent consistent with this Decision and Order.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the General Counsel was permitted to call to the Board's attention its recent decision in *Contek Int.*, 344 NLRB 879 (2005).

[3] All dates are in 2003, unless otherwise indicated.

[4] The record is silent on the exact date of this event.

[5] The NYSUT is an umbrella association of 170 local unions in New York State. Since 1993, Derrick has worked with 14 or 15 NYSUT locals, including the Respondent, assisting them with contract negotiation and maintenance, training, problem solving, and personnel issues. There is no evidence on the record to support the judge's finding that Derrick is an attorney.

objection to bonuses as long as they were fair and equal across the board to every teacher. Kahn replied, "Oh, yes, absolutely," or "of course" and, together with fellow school committee member Garry, he emphasized that the School wanted to retain the "latitude" and "the right to give extra money as it had done in the past" to the teachers for grade coordination and similar duties. In his contemporaneous notes of the bargaining session, the Respondent's chief negotiator Derrick wrote simply that the School "Reserve [sic] the right to give bonuses."

A mediator assisted the parties for their last two bargaining sessions. During the final session, on September 3, Brossman, at the request of the mediator, prepared and presented a draft stipulation of agreement summarizing the issues on which the parties had agreed. Article XII of the draft, an alphabetized list of paragraphs under the caption "Compensation," included a statement that "A new Paragraph K shall be added which shall read as follows: 'The School has the right to pay bonuses without Union approval.'" The mediator reviewed each paragraph of the stipulation of agreement and for article XII(K) he stated, "Bonuses, as agreed to by the two parties." The Respondent specifically requested the addition of clarifying language to several provisions, but not to the bonus provision. The parties agreed that Brossman would revise the stipulation of agreement to reflect the negotiated changes and fax a copy to the Respondent. The parties ended the session with congratulatory handshakes and mutual statements of satisfaction about having successfully negotiated a successor collective-bargaining agreement.

On September 5, Brossman faxed a revised stipulation of agreement embodying the agreed changes to the Respondent. Derrick immediately received and reviewed the document. He had a couple of telephone conversations with Brossman in which he pointed out a few typographical errors in the document and sought clarification of some concerns he had regarding certain provisions. Derrick did not mention the bonus provision, the language of which appeared unchanged in the new document.

Still on September 5, Derrick held a lunchtime meeting with his other negotiating committee members during which they reviewed the provisions of the revised stipulation of agreement item by item. Derrick explained that the bonus provision was "a codification of the School's practice," and that "it wasn't any new or expanded power that management had." He further emphasized that, "based on his discussions with Brossman," his "understanding of it [the bonus provision] was that it was simply to do those things referred to earlier about the grade coordinators and things of that nature." The committee endorsed the revised stipulation of agreement and decided to recommend its ratification to the bargaining unit employees.

On September 8, the Respondent conducted a general membership meeting, during which Derrick distributed the revised stipulation of agreement and a 2-page document entitled, "Settlement Highlights" that he had prepared listing the major terms of the parties' agreement. After a thorough discussion of the contract's terms, the Respondent's negotiating committee recommended ratification. Two days later, the employees voted to ratify the agreement. Derrick immediately notified Brossman of that event and, later that same day, Derrick checked into the hospital for kidney transplant surgery.

On September 17, the School's board of trustees ratified the stipulation of agreement and the School immediately implemented the terms and conditions of the agreement, including pay raises and bonuses. Then, about the middle of October, Brossman incorporated the terms of the ratified stipulation of agreement verbatim into a successor collective-bargaining agreement that had the effective date from July 1, 2003, to June 30, 2008, and he sent the latter document to the Respondent for signature. Crosby received but refused to sign the agreement, according to his testimony, because he "realized" that the bonus language did not accurately reflect what he thought the parties had agreed to during the June 24 bargaining session.[6]

On October 22, Kahn met with Crosby to discuss the reason for the Respondent's delay in executing the collective-bargaining agreement. Crosby pointed to the bonus clause of the agreement and asked Kahn, "Where's the other half of the line that we agreed to? That it be [sic] 'fair and equally across the board.'" Kahn denied that the parties had agreed to the inclusion of that phrase, adding that the contract had already been ratified by both the Respondent's membership and the School's board of trustees, and that it had been implemented by the School. Kahn told Crosby that the School's proposal to include its previously unregulated bonus practice in the contract was aimed at having contractual language to "justify" the administration's payment of bonuses for such tasks as

[6] Crosby asserted several reasons for his alleged failure "to catch" the alleged mistake in the bonus clause earlier. First, he denied seeing the bonus language in the draft stipulation of agreement presented at the September 3 mediator-assisted bargaining session. Next, he acknowledged attending his committee's September 5 meeting, receiving a copy of the stipulation of agreement at that meeting, and that the committee reviewed every item on the stipulation of agreement. However, he claimed that he was not in the room when the committee reviewed the bonus provision. Further, he admitted attending the September 8 membership meeting, but denied seeing the stipulation of agreement at that meeting.

coordinators. At that point, Crosby stated, "You know, all we have to do is put it [the bonus clause] on the stipend page. Because that is more appropriate . . . . Work for a stipend, a specific job, is not a bonus." Kahn disagreed.

On October 24, Derrick returned to work—after a 6-week sick-leave absence—and learned of the Respondent's refusal to sign the collective-bargaining agreement. Derrick telephoned Brossman and stated that "he [Derrick] was being attacked by [the Respondent's] membership, that they *wanted change* in the language in the agreement dealing with bonuses," (emphasis added) and suggested that the parties add the phrase "consistent with past practice" to the bonus clause. Brossman stated to Derrick that the collective-bargaining agreement had been negotiated and ratified for a month and a half, and he added that although he would take Derrick's suggestion to the School, he was concerned about opening the contract for the renegotiation of certain provisions. Derrick urged Brossman, "sort of as a personal favor," to see if "this was something that the parties could solve."[7] Thereafter, Brossman reported to Derrick that the School had refused the proposed change.

On November 3, the School executed the agreement, and sent it to the Respondent for signature. By letter dated November 11 and addressed to Kahn, Crosby responded that "there was a deletion of a line that changed the whole complexion of the agreement." The letter continued, "The line which was agreed upon by both parties should have read, 'The Windward School has the right to give bonuses without Union approval as long as each teacher is given the same amount of money across the board.'"

On November 24, Brossman replied that the Respondent's dispute was over the interpretation of the language of the bonus provision, and that the collective-bargaining agreement provided for the resolution of such disputes through the grievance procedure. Brossman listed the opportunities that the Respondent had to review, discuss, and suggest changes to the bonus language but failed to do so; and he denied, as "completely false," Crosby's claim that a line had been deleted from the agreement. The Respondent never executed the School's draft agreement.

Analysis

It is well settled that Section 8(d)'s obligation to bargain collectively requires either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations. Section 8(b)(3) implements that obligation by making it an unfair labor practice for a union to refuse an employer's request to sign a negotiated agreement. See *Graphic Communications Union District 2 (Riverwood International USA),* 318 NLRB 983, 990 (1995), and cases cited therein. Cf. *H. J. Heinz v. NLRB,* 311 U.S. 514 (1941). However, this obligation arises only if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. See *Sunrise Nursing Home,* 325 NLRB 380, 389 (1998). The General Counsel bears the burden of showing not only that the parties had the requisite "meeting of the minds" on the agreement reached but also that the document which the respondent refused to execute accurately reflected that agreement. See *Kelly's Private Car Service,* 289 NLRB 30, 39 (1988), enfd. sub nom. *NLRB v. W.A.D. Rentals Ltd.,* 919 F.2d 839 (2d Cir. 1990); *Cherry Valley Apartments,* 292 NLRB 38, 40 (1988); *Paper Mill Workers Local 61 (Groveton Papers Co.),* 144 NLRB 939, 941–942 (1963). If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act. See *H. J. Heinz Co.,* 311 U.S. at 525–526.

The expression "meeting of the minds" is based on the objective terms of the contract, not on the parties' subjective understanding of those terms. See *Hempstead Park Nursing Home,* 341 NLRB 321, 323 (2004). It does not require that both parties have an identical understanding of the agreed-upon terms. See *Ebon Services,* 298 NLRB 219, 223 (1990), enfd. mem. 944 F.2d 897 (3d. Cir. 1991); *Longshoremen ILA Local 3033 (Smith Stevedoring),* 286 NLRB 798, 807 (1987). Where the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract. See *Teamsters Local 617 (Christian Salvesen),* 308 NLRB 601, 603 (1992).

Examined under the foregoing principles, we find, for the reasons set forth below, that the General Counsel has established that the parties reached a "meeting of the minds" on the terms of a contract, including the bonus clause, and that the document submitted to the Respondent by the School for the Respondent's signature accurately reflected that agreement. Accordingly, we conclude that the Respondent is obligated to execute the School's draft successor collective-bargaining agreement containing the bonus provision.

As an initial matter, it is clear, as the judge found, that both parties believed they had reached a complete agreement on a successor contract at the last bargaining session on September 3. The parties concluded that session with handshakes and mutual expressions of satisfac-

[7] Derrick and Brossman had a good working relationship that dated back to their participation in the 1988 negotiations for the parties' first collective-bargaining agreement.

tion on their successful negotiation of a contract. Such conduct is a hallmark indication that a binding agreement has been reached at the end of negotiations. See *Graphic Communications District 2 (Riverwood International USA)*, supra (handshakes to seal the parties' successful arrival at agreement); *Brooks, Inc. v. International Ladies' Garment Workers Union,* 835 F.2d 1164, 1169 (6th Cir. 1987) ("tone and temperament of the parties" at the end of negotiations signaled agreement).

More importantly, the Respondent reviewed several versions of the contract without objecting to the terms of the bonus clause that were identical to the terms that the Respondent challenged in the draft successor collective-bargaining agreement language submitted to it October. The Respondent thereby consented to the integration of that language into the complete agreement. The bonus clause provision appeared as article XII(K) in three separate documents, including the September 3 draft stipulations of agreement, the September 5 revised stipulation of agreement, and the successor collective-bargaining agreement. In the first two documents, the bonus provision, in plain language, states, "A new Paragraph K shall be added which shall read as follows: 'The School has the right to pay bonuses without Union approval.'" The Respondent admittedly reviewed that bonus language on numerous occasions and never once disputed its accuracy,[8] thereby consenting to the subsequent integration of the latter part of that provision into the parties' successor agreement. The Respondent circulated that same stipulation of agreement to its members, who had the opportunity to read it and vote on it. The membership ratified the agreement. Pursuant to the stipulation of agreement and the employees' and the School's board of trustees' ratification of the agreement, the School prepared the successor contract, which included the same language: "The School has the right to pay bonuses without Union approval."

The judge dismissed the allegation on the basis of his finding that there was "no meeting of minds between the parties on the language of the bonus clause."[9] The judge cited three types of evidence in support of this conclusion: first, credited testimony that at the June 24 bargaining session, the Respondent conditioned its acceptance of the School's proposal that the successor contract grant it the right to give bonuses without union approval on the understanding that bonuses were to be "fair and equitable and across the board," an understanding that the final contract language failed to reflect; second, evidence that the Respondent's assent to the bonus language in the final agreement was based on its good-faith failure to notice the "problem with the bonus language" until its members saw the final collective-bargaining agreement in mid-October; and third evidence that the parties have subsequently advanced conflicting interpretations of the meaning of the bonus clause.

Contrary to the judge, this evidence does not support his ultimate finding that there was no meeting of minds between the parties on the terms of the bonus clause. First, regarding the question of whether the final bonus language failed to reflect understandings reached by the parties at the June 24 bargaining session, we observe initially that the judge did not find—and the evidence does not show—that on that date the parties reached a meeting of minds regarding the *terms* of the bonus clause to be incorporated in the final contract. At most, the credited evidence shows only that the School orally agreed to the interpretation of the proposed bonus clause advanced by the Respondent's negotiators. There was no agreement on specific language to be used.[10] More fundamentally, however, the credited evidence shows that in September the Respondent received, reviewed, and duly ratified a final agreement that incorporated the bonus clause language set forth in the September 3 draft stipulation of agreement, and that this clause did not include any language reflecting the proviso discussed at the June 24 negotiations. In September, therefore, the parties *did* reach a meeting of the minds as to the language of the bonus clause that was to be included in the final contract. The Respondent may not, therefore, refuse to execute the final agreement on the ground that this agreement failed

[8] By contrast, during the mediator-assisted final bargaining session on September 3, the Respondent suggested changes to numerous provisions of the draft stipulation of agreement and, thereafter, submitted new language to be added to the provisions addressing salary scales for some teachers and the number of days in the school year. Then, upon receipt of the September 5 revised stipulation of agreement reflecting the agreed changes, the Respondent contacted the School to point out some errors in the document and to seek clarification on certain points.

[9] The judge states that the Respondent's negotiators failed to catch "missing language that bonuses be fair and equitable and across the board" in the September 5 stipulation of agreement. Given the judge's definite and repeated finding that "there was no meeting of minds between the employer and the union on the language of the bonus clause," we do not interpret this reference as implying that the judge found that the parties had agreed on June 24 to include the expression "fair and equitable and across the board" in the bonus clause.

[10] Chairman Battista does not find that the parties agreed that future bonuses would be awarded in any particular way. He believes that the written language of the contract is clear and unambiguous, i.e., the school has authority to give bonuses, without union approval, and there is no requirement to give bonuses in any particular way. Accordingly, he does not pass upon the issue of whether parol evidence varied the terms of the agreement. In any event, that parol evidence is ambiguous. School agent Kahn arguably agreed that the bonus would be fair and equal and across the board to every teacher, but School agent Gary then immediately said that the School retained its "latitude." Chairman Battista would not permit the ambiguous parol evidence to vary the clear terms of the written agreement.

to embody the results of the June 24 negotiations. See *Ebon Services,* 298 NLRB 219 fn. 2 (1990) (employer obligated to execute contract that he had reviewed and agreed to sign notwithstanding alleged discrepancies between what was discussed in negotiations and terms of final contract).

Nor does the judge's apparent finding that the Respondent's failure to object to the written bonus clause in September was based on good-faith oversight on its part excuse the Respondent's refusal to execute the final agreement. A contracting party's error, even if made in good faith, does not excuse its refusal to execute a collective-bargaining agreement unless that error constitutes a legally cognizable mutual or unilateral mistake. There was no mutual mistake as to the terms of the agreement because the wording of the bonus clause in the successor agreement submitted by the School for the Respondent's signature was identical to that proposed by the School on September 3. Any mistake, therefore, can have been made only by the Respondent. The doctrine of unilateral mistake is also inapplicable in these circumstances, however, because "[a] party to a contract cannot avoid it on the ground that he made a mistake where the other contractor has no notice of such mistake and acts in perfect good faith." *North Hills Office Services*, 344 NLRB 523, 528 (2005). See also *Apache Power*, 223 NLRB 191 (1976) (rescission based on unilateral mistake should be a carefully guarded remedy and reserved for those instances where a mistake is so obvious as to put the other party on notice of the error). Here, as discussed more fully above, the Respondent reviewed several writings containing the bonus clause language without objecting to that language and then refused to sign the successor agreement on the asserted ground that identical language contained in that agreement was defective. Even assuming that the Respondent made a bona fide mistake in failing to object to the bonus clause as written, its mistake was not so obvious as to put the School on notice that Respondent's clearly manifested assent was made in error. On the contrary, the Respondent's conduct gave the School every reason to suppose that the bonus language reflected the parties' exact agreement. Accordingly, the Respondent may not avoid the contract on grounds of either unilateral or mutual mistake.[11]

Finally, the evidence that the parties held conflicting subjective interpretations of the meaning of the bonus-clause terms that the parties agreed in September to incorporate within the final contract does not support the judge's conclusion that the parties failed to reach a meeting of minds on the language of the contract. It is well settled that where parties have reached agreement on the specific terms of a contract, subsequent disagreement over the meaning of those terms does not excuse a refusal to execute the agreement. *Graphic Communications District 2,* 318 NLRB at 992–993; *Teamsters Local 617,* 308 NLRB at 603.

In sum, it is clear that the parties agreed on the terms of the successor collective-bargaining agreement submitted by the School for the Respondent's signature. The Respondent's disagreement with the School over the scope of the bonus clause contained in that agreement is a dispute over interpretation, which does not justify the Respondent's refusal to execute the agreement. Accordingly, the Respondent's refusal to sign the agreement violated Section 8(b)(3) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Windward School is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, Windward Teachers Association, NYSUT, AFT, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since 1988, the Respondent has been the exclusive collective-bargaining representative of the unit employees and has been recognized as such by the School in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period July 1, 1998, to June 30, 2003.

4. The Respondent and the School reached complete agreement, on September 3, 2003, concerning terms and conditions of a successor collective-bargaining agreement.

5. By refusing, since on or about October 22, 2003, to execute the draft successor collective-bargaining agreement, which embodies the terms of the September 3, 2003 agreement between itself and the School, the Respondent has engaged in acts and conduct violative of Section 8(b)(3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that Respondent violated Section 8(b)(3) of the Act by failing and refusing to execute the agreement reached by it and the School, it shall be ordered to cease and desist from refusing to sign the agreement and to take certain affirmative actions designed to effectuate the policies of the Act.

[11] The Respondent does not claim fraud, bad faith or inequitable conduct on the part of the School.

ORDER

The National Labor Relations Board orders that the Respondent, Windward Teachers Association, NYSUT, AFT, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to execute the successor collective-bargaining agreement that was submitted to it by the School and which embodies the terms of the agreement reached on September 3, 2003, between itself and the School.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, forthwith execute the collective-bargaining agreement that was submitted to it by the School for signature.

(b) Within 14 days after service by the Region, post at its office and meeting halls in White Plains, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to sign the collective-bargaining agreement, which was submitted to us by Windward School for our signature, and which embodies the terms of our September 3, 2003 agreement with Windward School on the terms and conditions of a successor collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, on request, forthwith execute the collective-bargaining agreement, which was submitted to us by Windward School for our signature.

WINDWARD TEACHERS ASSOCIATION, NYSUT, AFT, AFL–CIO

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Terry-Ann Cooper, Esq., for the General Counsel.

John L. Schlechty, Esq., of Elmsford, New York, for the Respondent.

Scott A. Gold, Esq. (Schulte, Roth & Zabel, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On December 9, 2003, a charge in Case 2–CB–19578–1 was filed against the Windward Teachers Association, NYSUT, AFT, AFL–CIO (the Union or Respondent) by the Windward School (the Charging Party or Employer or School).

On October 26, 2004, the National Labor Relations Board (the Board), by the Regional Director for Region 2, issued a complaint alleging that Respondent violated Section 8(b)(3) of the National Labor Relations Act (the Act) when it failed and refused to honor the Employer's request to execute a written contract embodying the complete agreement it had reached with the Employer on the terms and conditions of employment.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on February 28 and March 2 and 3, 2005, in New York City.

Upon the entire record in this case, to include posthearing briefs submitted by counsel for the General Counsel, counsel for Respondent, and counsel for the Charging Party and giving due regard to the testimony of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

At all material times, the Charging Party or Employer has operated a private independent school, located in White Plains, New York.

Respondent Union admits, and I find, that at all material times the Charging Party Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. THE LABOR ORGANIZATION INVOLVED

Respondent Union admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Overview

The Windward School is a private independent school located in White Plains, New York. The Union has represented a unit of employees at the school since 1988. The unit of employees the Union represents is as follows:

> All full-time and part-time professional employees, including the computer teacher and the librarian, and the full-time maintenance and custodial employee. Excluded: the Head of School, Business Manager, Division Heads, clerical employees, Dean of Student Activities, Guidance Counselor, School Psychologist, Director of Education, Director of Development, Director of Admissions, Director of Communications, Director of Athletics, Director of Finance and Operations, Director of Special Services, Speech/Language Therapists and guards and supervisors as defined in the Act.

The most recent collective-bargaining agreement between the parties was effective from July 1, 1998, to June 30, 2003.

Beginning in May 2003, the parties began negotiations for a successor collective-bargaining agreement.

The parties had a total of eight negotiating sessions. The first session was held on May 20, 2003, and the last session was held on September 3, 2003.

At the last two negotiating sessions the parties had the assistance of a mediator.

On September 3, 2003, both parties believed that they had reached a complete agreement on a successor contract. After ratification by the union membership on September 10, 2003, and by the board of trustees of the school on September 17, 2003, the Employer implemented the terms and conditions of employment contained in the agreement which included pay raises for unit employees.

Counsel for the Employer on November 3, 2003, having earlier sent copies of the collective-bargaining agreement to the Union, which agreement was to run for a 5-year term from July 1, 2003, to June 30, 2008, requested that the Union sign the agreement. On or about November 11, 2003, the Union refused on the grounds that the written agreement did not accurately reflect the agreement reached by the parties.

The Employer filed a charge with the National Labor Relations Board, which issued a complaint alleging that the Union violated Section 8(b)(3) of the Act when it refused to sign the agreement agreed to by the parties.

Section 8(b)(3) of the Act provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

Section 8(d) of the Act provides, in part, as follows:

> (d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement of any question arising thereunder, and *the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession*. . . . [Emphasis added.]

The dispute between the parties boils down to a disagreement over a new paragraph 12K of the agreement. The language in the contract which the employer claims was agreed to is as follows: "The School has the right to pay bonuses without Union approval." The Union claims that the parties agreed to that language provided the granting of bonuses was fair and equitable and across the board. The employer takes the position that the language puts no conditions on the employer when it comes to granting bonuses.

It is my finding that there was no meeting of the minds on paragraph 12K and, therefore, there was no complete agreement on the terms and conditions of employment and the Union did not violate Section 8(b)(3) of the Act when it refused to sign the collective-bargaining agreement. Had there been complete agreement, which there was not, the Union's refusal to sign the agreement would be a violation of the Act. See *Teamsters Local 617 (Christian Salvensen),* 308 NLRB 601, 602 (1992).

B. Discussion

The parties agree that when negotiations began that in addition to economics the two major issues were the school's desire to have individual employment contracts with its teachers, so the school would know who would be returning to teach the following school year and school's desire to do away with the union-security clause in the contract, because the school thought some prospective teachers they may want to hire in the future would not want to become members of a union. The school also wanted to clean up some language in the contract to be more consistent with the practice of the parties.

Suffice it to say the parties reached an agreement on the issue of individual contracts by agreeing to a new article XIX which provided as follows:

> ARTICLE XIX
> INDIVIDUAL CONTRACTS
>
> Each non-probationary faculty member covered by this Agreement shall have an individual employment contract in the form attached as Exhibit 2. It is understood and agreed that the intent of this section is to provide the School with sufficient notice of a faculty member's decision not to return for the following school year to enable

the School to competitively participate in the hiring of prospective new faculty. In return, the School will agree to employ the faculty member for the following school year notwithstanding lack of enrollment. Nothing herein shall supersede Article VI of this Agreement. This section shall not apply to assistant teachers.

Accordingly the parties have agreed to the following timetable:

February 15th: the School shall offer a contract for the following school year to all non-probationary teachers and to all probationary teachers about whom there is no evaluative concern under the provisions of the Agreement and for whom a position is expected to exist.

March 1st: faculty shall return a signed contract or request an extension in writing. In those cases, the School shall grant a one (1) month extension.

April 1st: faculty who were granted extensions shall return a signed contract. If the staff member does not return a signed contract, the School shall be free to fill the positions which have not been accepted.

If a teacher has executed an individual employment contract for the following school year, it shall be a breach of contract for the teacher to subsequently accept a position with an educational institution within a one-hundred mile radius of the West Red Oak Lane Campus. The School agrees that it will not pursue legal remedies with respect to the breach of contract against the individual teacher.

The old contract (July 1, 1998–June 30, 2003) contained the following article regarding union security:

ARTICLE II
MEMBERSHIP AND PAYMENT OF DUES

MEMBERSHIP

Windward School and WTA agree that as a condition of employment all employees within the scope of the bargaining unit shall become members of WTA within thirty (30) days after commencing employment.

1. All employees who become members of WTA shall remain members during the life of the Agreement.
2. Upon receiving a signed statement from WTA indicating that an employee has failed to comply with the above conditions, said employee's services shall be discontinued within two (2) working days after receipt of notification. Refusal to join WTA is recognized as just and reasonable cause for termination of employment.
3. This provision does not affect employees hired for summer or after school activities.

MAINTENANCE OF FEES AND ASSESSMENTS

All fees for Union membership, as prescribed in the constitution and bylaws of WTA shall be deducted in equal amounts from each payroll check of each member and remitted promptly to NYSUT by Windward School.

1. The permission to retain the fees and assessments shall be granted through the signing of agreed upon authorization cards.
2. The granting of authorization shall indemnify Windward School against any and all claims or other forms of liability that may arise out of such authorization. Further WTA holds Windward School harmless for any sums so deducted as to any and all liability as a result thereof.
3. The withdrawal of authorization may be accomplished only through the termination of the Agreement, or through written notification, to both the Windward School and WTA, of his/her desire to withdraw such authorization three (3) days prior to the annual anniversary of the granting of such authorization. Otherwise, the granting of such authorization shall remain in effect during the life of this Agreement.
4. The authorization cards shall consist of the following form:

Last Name _____ First Initial _____ Initial _____

TO: Windward School

I hereby request and authorize Windward School according to arrangements agreed upon with WTA to deduct, in equal amounts from each payroll check, all fees as certified by WTA to be required by the constitution and bylaws of WTA. I hereby waive all right and claim for monies so deducted and transmitted in accordance with the authorization and relieve Windward School from any liability for said sums. The right to withdraw this authorization shall exist only during the three days preceding the anniversary of this authorization through the use of a written instrument. Otherwise, this authorization shall be continuous for the duration of the contract.

_____ _____
Employee Signature Date

The parties reached an agreement to modify the above union-security clause. The language agreed to by the parties was as follows:

ARTICLE II
MEMBERSHIP AND PAYMENT OF DUES

MEMBERSHIP

Windward School and WTA agree to an Agency Shop. As a condition of employment all employees within the scope of the bargaining unit shall elect within thirty (30) days after commencing employment either to join the union or to pay to the WTA its cost of representation (but not costs or fees relating to the Union's political and other non-representational activities).

1. Only members of the Union or non-members paying the agency fee may be employed or continue to be employed. Upon receiving a signed statement from the WTA indicating that an employee has failed to comply with the above conditions, said employee's services shall be discontinued within two (2) working days after receipt of notification.

2. This provision does not affect employees hired for summer or after school activities.
3. No member of the faculty shall be discriminated against because of membership or non-membership in the Union.

MAINTENANCE AND FEES AND ASSESSMENTS

All fees for Union membership or for non-members paying the agency fee, as prescribed in the constitution and bylaws of WTA shall be deducted in equal amounts from each payroll check of each employee and remitted promptly to WTA by Windward School.

1. The permission to retain the fees and/or assessments shall be granted through the signing of agreed upon authorization cards in the form attached hereto as Exhibit 1A (Membership) and 1B (Non-membership).
2. The granting of authorization shall indemnify Windward School against any and all claims or other forms of liability that may arise out of such authorization. Further WTA holds Windward School harmless for any sums so deducted as to any and all liability as a result thereof.
3. The withdrawal of authorization may be accomplished only through the termination of the Agreement, or through the member's written notification to both the Windward School and WTA or his/her desire to change authorization.

EXHIBIT 1A
AUTHORIZATION FOR MEMBERSHIP

Last Name _____ First Name _____ Initial _____

TO: Windward School

I hereby request and authorize Windward School according to arrangements agreed upon with WTA to deduct, in equal amounts from each payroll check, all fees as certified by WTA to be required by the constitution and bylaws of WTA. I hereby waive all right and claim for monies so deducted and transmitted in accordance with the authorization and relieve Windward School from any liability for said sums. The right to withdraw this authorization shall exist only during the three days preceding the anniversary of this authorization through the use of a written instrument. Otherwise, this authorization shall be continuous for the duration of the contract.

_____ _____
Employee Signature Date

EXHIBIT 1B
AUTHORIZATION FOR NON-MEMBERSHIP

TO: Windward Teachers Association, NYSUT, AFT, AFL–CIO

To Whom it May Concern:

Pursuant to Article II of the collective-bargaining agreement between the Windward School and the Windward Teachers Association, NYSUT, AFT, AFL–CIO ("the Union"), the undersigned hereby elects not to be a member of the Union.

Accordingly, I will only pay the cost of representation and it is agreed that the Union shall rebate to me all costs and fees relating to the Union's political and other non-representational activities.

Sincerely,

_____

cc: Windward School

The parties reached agreement on these two very contentious issues, i.e., individual contracts and changing to an agency shop. The parties, by the end of the last negotiating session, reached an agreement on economics.

The chief negotiator for the school was Attorney Mark Brossman. He was assisted by Dr. Daniel Kahn, the assistant head in charge of planning and resources at the Windward School and two members of the Windward School's board of trustees, Leigh Garry and Bill Jacoby.

The chief negotiator for the Union was Attorney Dennis Derrick, a former school teacher who was facing major surgery, i.e., a kidney transplant, right after the negotiations ended. He was assisted by Union President Larry Crosby, who is also a teacher at the school, and several other teachers at the school, i.e., Lisa Bambino, John Vermette, Mara Cohen, Beth Foltman, and Kaarina Bauerle.

At the negotiating session on June 24, 2003, Brossman told the Union that he had a proposal that the parties could agree to and then Dr. Kahn said that the school wanted the authority to pay bonuses without union approval if it had extra money. According to the testimony of Brossman, Kahn, and Garry, the Union appeared to agree to this proposal, but said nothing one way or the other and did not condition in any way the school's authority to give bonuses. Board of trustees member Bill Jacoby did not testify. Lisa Bambino, one of the union negotiating committee members, who later quit her leadership position in the Union, likewise testified in the General Counsel's case that the Union agreed to this proposal and did not condition the school's authority to give bonuses in any way.

However, all the other members of the union negotiating team, i.e, Attorney Dennis Derrick, Larry Crosby, John Vermette, Mara Cohen, Beth Foltman, and Kaarina Bauerle specifically remember that the Union was agreeing to the school giving bonuses without union approval if the bonuses were fair and equitable and across the board. Derrick, Crosby, Vermette, and Bauerle testified it was Larry Crosby who said the Union would have no objection to bonuses if fair and equitable and across the board. Foltman didn't testify one way or the other as to who said it, but someone did and Cohen said someone said it but she wasn't sure who it was. They all agree that Dr. Kahn responded by saying "of course" or "absolutely" when Crosby said ok to bonuses if fair and equitable and across the board.

All the individuals involved in the negotiations on both sides were aware that some years earlier during the first year that Dr. James E. Van Amburg was head of school, the school had an "extra" $100,000 and gave the same amount bonus ($2000) to each and every member of the unit returning for the new school

year. Accordingly, Crosby's statement after management said it wanted authority to pay bonuses without union approval that the Union would have no objection if the payment of bonuses was fair and equitable and across the board makes sense.

I found Crosby and Derrick to be very credible. Likewise, I fully credit the testimony of John Vermette who is still a teacher at the school, Mara Cohen, who left the Windward School and now teaches in a public school, Beth Foltman, who is no longer represented by the Union, because she has been promoted to the position of assistant principal at the school, and Kaarina Bauerle, who still teaches at the school and receives extra compensation because she serves as the coordinator for the third grade teachers at the Windward School. Bauerle is now the union vice president since Cohen left the school to teach in a public school. Crosby has been a teacher at the school for over 25 years, Vermette has been a teacher at the school for 16 years, and Cohen had taught at the school for 13 or 14 years before moving on to a public school.

Board of trustee member Leigh Garry testified as follows:

> Q. What is your understanding—the bonuses would be paid without Union approval by the School for what?
>
> A. For whatever the School wanted to pay them for.
>
> Q. In other words they could say "well, you were a better sixth grade teacher than the other persons; so therefore the other person will get what the contract calls for and you're going to get what the contract calls for plus a bonus"?
>
> A. That was certainly never used as an example.
>
> Q. Okay. Is it your understanding that you could not do that under 12-K?
>
> A. My understanding is that we don't need to ask the Union to approve how we compensate our teachers.
>
> Q. Although all salaries are in the contract, aren't they?
>
> A. Extra Salary.
>
> Q. But is it extra compensation for extra duties? Or is it anything the School wants it to be?
>
> A. I think the Administration and the Board wanted to give our Administration was as much flexibility as possible.
>
> Q. So that they could give a bonus to a teacher for any reason they wanted under the sun?
>
> A. Sure.

Dr. Kahn testified before me on the reasons for the School's bonus proposal in the 2003 negotiations as follows:

> We wanted it I think for two major reasons. (1) We wanted to make sure that we were going to only pay monies that were specified within the contract. We didn't want to pay anything that was outside of the contract. So we wanted to codify everything that was in the past. The other reason is we were very concerned—there is a very competitive market for teachers in independent schools. It is typical that independent schools pay bonuses for exceptional performance or effort or something that's unusual. We wanted to have that same opportunity so that we could be consistent with our competitors. And not knowing what that might be from year to year, we didn't want to have to go back to the Union every single time that somebody took on additional responsibilities or did something additional during the school day. We wanted to be able just to recognize that within the contract, put it in the contract so it would be able to be taken care of. We didn't see this as a big issue because it's standard practice in our business. It's standard practice. So we wanted it for, I guess the two reasons that I just explained.

The testimony of Garry and Kahn at the trial before me as to the meaning of the bonus language was not told to the Union during bargaining.

Testimony at the hearing referred to the practice that extra moneys paid to teachers were specified in the contract, e.g., teachers working with school clubs, coaching sports, etc. Some extra money paid to teachers was not specifically covered in the agreement, i.e., moneys for being class coordinators for chaperoning students on out of town trips or overnight sleep overs.

Dennis Derrick and Lisa Bambino thought the proposed bonus language of paragraph 12K was to have in the contract language authorizing the payment of extra moneys to teachers for being class coordinators or for doing extra duty like chaperoning a class trip to Boston or Washington.

The rest of the union negotiating team thought that the bonus language of paragraph 12K was to authorize an across-the-board bonus in the same amount to each member of the unit as was done during Dr. Van Amburg's first year as head of school.

Dr. Kahn and Garry gave the bonus language a much broader meaning, i.e., the school could pay bonuses for any reason it thought was a good reason.

One thing is clear—there was no meeting of the minds on the bonus language.

It seems clear that the school wanted the authority to pay bonuses without union approval either consistent with past practice such as occurred in Dr. Van Amburg's first year as head of school or for extra duties not covered in the prior agreement and also wanted the authority to pay bonuses without union approval if something came up which management could not foresee at the time of negotiations, possibly the payment of a bonus without union approval to keep a prized teacher who was tempted to leave the Windward School for a higher paying teaching position elsewhere.

It is also clear that much of the union negotiating team, i.e., Crosby, Vermette, Cohen, Foltman, and Bauerle, envisioned the payment of bonuses without union approval to be fair and equitable across the board such as was done in Dr. Van Amburg's first year as head of school.

General Counsel's Exhibits 4 and 6 were received in evidence. General Counsel's Exhibit 4 is a 5-page document prepared by Mark Brossman, the chief spokesman for the school, summarizing the Employer's proposal and entilted "Stipulation of Agreement." It contains a statement under article III (compensation) that reads "A new Paragraph K shall be added which shall read as follows: 'The School has the right to pay bonuses without Union approval.'"

Brossman prepared the document prior to the last negotiating session on September 3, 2003, which was long after the June 24, 2003 meeting where the parties discussed the bonus issue and appeared to reach agreement on it, but where I find there

was no meeting of the minds. The mediator was not present at the June 24, 2003 session.

At the September 3, 2003 negotiating session, Brossman marked up his copy of General Counsel's Exhibit 4 to reflect the parties' "agreement," and created General Counsel's Exhibit 6 which purported to be the parties' agreement. The section on article XII, paragraph K, i.e., bonuses, remained the same as in General Counsel's Exhibit 4, i.e., "the School has the right to pay bonuses without Union approval." When the mediator went over the stipulation of agreement he said the bonus clause was as agreed to by the parties.

General Counsel's Exhibit 6 was sent to the union negotiating committee who reviewed it on September 5, 2003, without catching the problem with the new article XII, paragraph K, i.e., the missing language that bonuses be fair and equitable and across the board. The union negotiating committee recommended ratification to the membership at a meeting on September 8 and on September 10, 2003, the membership, in a close vote, voted to ratify the agreement.

Attorney Dennis Derrick prepared a 2-page "Settlement Highlights" paper to deliver at the union membership meeting on September 8, 2003, which is in evidence as Respondent's Exhibit 6. There is no mention at all of article XII, paragraph K, i.e., the bonus language.

After ratification the Employer's lawyer put the collective-bargaining agreement together and sent it to the Union for signature. It was at this time that the union members saw the problem with the bonus language.

Union Attorney Derrick tried without success to get the Employer to add the language "consistent with past practice" to paragraph 12K, but the employer would not agree and the Union refused to sign the agreement. The language "consistent with past practice" would have covered extra pay for teachers who served as class coordinators or chaperons and would also cover a situation where a bonus was given similar to when a bonus was given during Dr. Van Amburg's first year as head of school.

As noted above, the school implemented the contract even though the Union would not sign it. Accordingly, the unit employees have received raises, etc.

Since I find there was no meeting of the minds between the Employer and the Union on the language of the bonus clause, I must necessarily conclude that the parties did not have a complete agreement on terms and conditions of employment and that the Union did not violate Section 8(b)(3) of the Act when it failed and refused to execute the contract sent to it by the employer. This is not a case where the Union changed its mind, but is a case of no meeting of the minds.

Ideally the parties should return to the table and reach agreement on the bonus clause (art. XII, par. K). The school's argument that the Union should sign the contract and grieve the meaning of the language would make sense if the parties had already signed the agreement and thereafter had a disagreement on its meaning, but it is not appropriate prior to execution. The parties should attempt to agree on bonus language. No doubt the Union should have caught this mistake earlier. This is unfortunate, but may be explained by Dennis Derrick's health problems. A former school teacher himself he entered the hospital for a kidney transplant on September 10, 2003, and returned to work on October 14, 2003, to learn of the problem with the bonus clause. He was out of work again for health reasons from November 19, 2003, to January 2004. Hopefully, he is fully recovered.

CONCLUSIONS OF LAW

1. The Windward School is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, Windward Teachers Association, NYSUT, AFT, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

[Recommended Order omitted from publication.]